

ITEM: 6

SUBJECT: Resolution Clarifying that the Delegation to the Executive Officer Includes the Authority to Issue Administrative Civil Liability Orders When No Hearing Is Required

BOARD ACTION: Consideration of Resolution

BACKGROUND: The Regional Board has previously adopted a resolution delegating to the Executive Officer the authority to act on behalf of the Regional Board in all matters except those the Board cannot delegate pursuant to Water Code section 13223(a). See Regional Board Resolution R5-2006-0023, attached. The proposed Resolution would amend that delegation by clarifying that the delegation includes the authority to issue Administrative Civil Liability Orders when no hearing is required.

The Porter-Cologne Water Quality Control Act (Porter-Cologne Act) (California Water Code Division 7) authorizes the Executive Officer of a Regional Water Quality Control Board (Regional Board) to issue administrative civil liability (ACL) complaints. The Porter-Cologne Act provides the right to the discharger to have a hearing before the Regional Board to contest the complaint. Alternatively, the discharger may waive the right to a hearing and pay the amount alleged in the ACL complaint.

The Administrative Procedure Act (APA) authorizes the Regional Board to settle adjudicative matters without a hearing and provides that the authority to approve a settlement may be delegated. (See Govt. Code §11415.60)

Historically, the resolution of ACL complaints generally occurred in one of three ways. 1. If the discharger contested the complaint, the Regional Board held an adjudicatory hearing and issued an ACL Order following the hearing. 2. If the discharger did not contest the complaint, the Regional Board issued an ACL order without a hearing. 3. If the discharger did not contest the complaint, the Executive Officer settled the ACL complaint by

entering into a settlement agreement with the discharger pursuant to a general delegation and the APA.

An ACL Order is the preferred method to resolve ACL complaints, including ACL complaints where the discharger does not contest the complaint and ask for a hearing. ACL Orders are more enforceable than settlement agreements because the Water Code provides specific remedies for collecting unpaid ACL Orders. ACL Orders are also more efficient than settlement agreements, because settlement agreements require substantial staff and legal counsel time to negotiate with each discharger. Finally, ACL Orders result in greater consistency in the enforcement program, because they are not subject to individualized drafting.

In Resolution No. R5-2006-0023, the Regional Board delegated all powers and duties that can be delegated to the Executive Officer. Therefore, the Regional Board has already implicitly delegated to the Executive Officer the authority to issue Administrative Civil Liability Orders when it is not necessary for the Regional Board to conduct a hearing. Nonetheless, as this is a practice that the Regional Boards have not traditionally employed, it is prudent that the delegation be explicit in order that the authority for this new practice is clearly expressed to the public and regulated community.

This Resolution explicitly delegates to the Executive Officer the authority to issue ACL Orders to settle ACL complaints where no hearing is required, including issuance of ACL orders that provide for Supplemental Environmental Projects (SEPs). Such delegation would not affect the rights of the public to comment on any proposed settlement of an ACL complaint. The delegation would have no impact on the Regional Board's current practice of conducting hearings to consider whether to adopt an ACL Order when the discharger has contested the ACL complaint and requested a hearing.

ISSUES:

The Regional Board may wish to discuss the following issues related to this draft resolution: Whether the

resolution should include limiting language or scenarios in which the Executive Officer should consider bringing proposed ACL Orders to the Board, such as settlements involving one or more of the following:

- Matters of a unique or unusual nature;
- Settlements over a particular dollar threshold;
- Highly controversial matters;
- Supplemental Environmental Projects.

Note that the delegation, even if unrestricted, would not preclude the Executive Officer from bringing proposed ACL Orders where no hearing is required to the Regional Board for its approval as she deems appropriate.

RECOMMENDATION: The Board should adopt the Resolution.

Central Valley Regional Water Quality Control Board
11020 Sun Center Drive, Suite 200
Rancho Cordova, CA 95670
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